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NOTE AND COMMENT.

THE LAW SCHOOL.—As a result of the increased requirements for admission, which are now in their second year of operation, the attendance at the Law School is less than that of last year, though the decrease is less than was anticipated at the time of the adoption of the higher requirements. The entering class (the second under the new standard) is about thirty larger than that of last year. There are no changes in the teaching staff, and none of great importance in the curriculum.

DEPOSITORS' CHECKS IN PAYMENT OF MATURED OBLIGATIONS HELD BY DRAWEE BANK AS PREFERENCES.—Since the case of *New York County Bank* v. *Massey*, 192 U. S. 138, there has been no doubt as to the right of a debtor of a bankrupt's estate to exercise the right of set-off as preserved by § 68a of the Bankruptcy Act. In that case it was laid down clearly that such right of set-off may be exercised despite the provisions of § 60a, which covers the matter of preferences. The question very frequently arises when bankers apply deposit balances upon matured obligations of customers. If such

application is made within four months of the time when the customer goes into bankruptcy, the contention that a preference has resulted is almost inevitable. The *Massey* case decided that under such circumstances there was not a voidable preference. There the deposits were made in the ordinary course of business, and the court carefully guards against expressing an opinion as to what the result would be in case of fraud or collusion between the depositor and bank.

In *Studley* v. *Boylston National Bank,* 33 Sup. Ct. 806, decided June 9, 1913, the Supreme Court had under consideration the same general question under facts somewhat different. In that case notes had been paid, within the four months' period, by the depositor by his own checks drawn upon his account with the payee bank. It was contended that the drawing of the checks made the case one of "payment" instead of set-off. But the court held that the transaction in essence was the same whether the matured notes were charged to the account or "paid" by means of checks signed by the depositor-borrower. The opinion is so worded as not to include within the doctrine of the case those cases where deposits are made by the borrower not in the ordinary course of business, but for the purpose of effecting a preference. Where it is shown that the deposits were made for the purpose of creating a fund so that the bank might exercise the right of set-off it seems clear from the cases referred to that the transaction would be declared a preference, and therefore voidable within § 60. Such seems to have been the situation, in the view of the court, in *Re Starkweather & Albert,* 206 Fed. 797, decided by one of the District Courts, April 25, 1913, and reported Oct, 9, 1913.

In the last mentioned case the bankrupts had on deposit, on the day their note matured, just a little more than sufficient to cover the amount due thereon, but there were then outstanding unpresented checks, to pay which there would not have been sufficient funds in the deposit account if the note were charged off. It was therefore agreed between the bank and depositor that the latter's check on the account should be given to cover the said note, post-dated four days in order that the outstanding checks might be paid when presented and other funds brought in to make up the shortage in the account caused by honoring said checks. At the expiration of the four days the note was retired and the check charged to the account. On application by the trustee to set aside the transaction as a voidable preference the court held, at least so far as the deposit was made for purpose of taking care of the post-dated check. and not for general purposes, it was tantamount to a payment direct to the bank. and was voidable as a preference. The court, however, went further and declared that the entire transaction, so far as it affected the payment of the note, was preferential and voidable. The court said that "the bank did not stand upon its right of set-off. It simply threatened to exercise that right. The matter terminated, however, on the basis of voluntary payments by Starkweather & Albert, in giving checks which were received by the bank as payments. While the distinction seems narrow between a payment resulting from the exercise of the right of set-off and a payment by check given in the presence of the power by the bank to exercise this right of set-off and application, yet the legal distinction exists, in that in the one instance

the act is that of the bank, and in the other that of the debtor." That the court was wrong on this feature of the case is clear from the *Studley* case. So far as there was money deposited for the particular purpose of paying the note, even though it may have been in the indirect manner of providing a fund to meet the check which paid the note, there would seem to have been a preference. But in going beyond that the court was wrong. R. W. A.

USE OF THE WRIT OF PROHIBITION TO PREVENT THE ENFORCEMENT OF A RESOLUTION BY A COMMISSION UNSEATING ONE OF ITS MEMBERS.—It is a well established principle of law that the writ of prohibition is in its nature a preventive and not a remedial measure. Though the principle itself seems plain and clear its application to a particular state of facts is fraught with no little difficulty and, as is well illustrated by a recent case in the Supreme Court of Michigan (*Eikhoff* v. *Charter Commission of City of Detroit,* 142 N. W. 746), is a frequent source of disagreement.

The Charter Commission of the City of Detroit, chose one Eikhoff to fill a vacancy in its membership, caused by the resignation of one of the commissioners. The appointee qualified and entered upon his duties as a member of the Commission. Because of certain statements made by him which tended to disgrace and humiliate the Commission and its members, a resolution proposing to vacate the seat of Eikhoff was introduced and taken under consideration by the Commission without any notice to or preferment of charges against him and without any hearing had. Pending the action of the Commission on this resolution Eikhoff filed a petition in the Supreme Court for a writ of prohibition to restrain the Commission from ousting him. Before the court acted on this petition and before any writ issued the Commission passed a resolution declaring the seat of the petitioner vacant and ousting him from membership in the Commission. Later a writ of prohibition enjoining the Commission from ousting the petitioner from membership therein, from depriving him of his rights as a member of the Commission and from interfering with the execution by the petitioner of his duties as a member of the Charter Commission was issued, and respondent, the Charter Commission, was required to show cause why the writ should be vacated. By a divided court (six justices favoring and two opposing the action) the writ was continued in force.

The main reason given by the dissenting justices for their disagreement with the majority of the court is that the act which the writ was issued to restrain had been done before the issuance of the writ, and that as the writ had not and could not perform any proper office it should have been vacated. These justices base their argument on the ground that the writ, though in form a continuing one enjoining interference with the petitioner in the performance of his duties, is really "dependent upon, and an elaboration of, the prohibition against taking action to unseat him," for to compel the Commission to recognize the petitioner as one of its members is in effect setting aside, by means of the writ, the judgment of the Commission.

As has been said, the writ of prohibition is preventive rather than reme-